In the Supreme Court of the United States

October Term, 1976

No. 76-705

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,
Respondents.

RESPONDENTS' (WEBB, ET AL.) BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PRIESMAN GRAPHICS—OMAHA, NEBRASKA

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STATEMENT OF THE CASE

The Court of Appeals noted petitioners' concession that the Omaha schools were *segregated* (A. 101). Its opinion cites the following evidence supportive of its finding that this segregation was intentional:

Faculty

The system's first black teachers were hired in 1940-41 and assigned to majority black schools, a practice followed in assigning every black teacher hired in the next 23 years. "As of 1961-62, the 57 black teachers employed by the district were assigned to seven majority black schools, and eighty majority white schools did not have a single black teacher." Black teachers were not assigned to teach in junior high and high schools until in 1959-60 and 1963-64, respectively, when there were majority black schools at those levels (A. 111). "Of 81 new black teachers hired between 1963 and 1969, 67 were assigned to majority black schools" (A. 112).

Faculty segregation continued as of trial. Statistics for 1972-73, the latest data available at trial, revealed that 121 (62%) of the system's 193 black teachers were assigned to 15 of the 99 schools in the system which were more than 50 percent black (A. 101-02). At the elementary level, Lothrop (96% black) had more black teachers (20) than 62 schools with less than 25% black enrollment (18) (A. 103; Plaintiff's Trial Exh. 2). Forty-six white elementary schools had not one black faculty member (A. 103).

The system presented a "role model" defense to the faculty segregation claim. However, it was "belied" by a 1966 report by the Superintendent "that the ACLU's request for non-white teachers in all Omaha public schools 'is currently unrealistic' but that '[t]he climate of our community has been increasingly receptive.'" (A. 113, n. 14).

Student Transfers

The system's transfer policy allowed students to attend schools outside their neighborhoods (A. 114). "The evidence presented on transfers granted in 1970-71 and 1971-72 shows that the effect of the transfer policy on the majority and predominantly black schools was profound" (A. 116). In those years, a significant percentage of the white students assigned to identifiably black elementary and intermediate schools transferred to white schools (A. 116). "Virtually all white South High alone received 250 white students from the Tech/Central zone in 1970-71, and 315 such students in 1971-72" (A. 116).

Some transfer requests explicitly based on racial reasons were granted. In 1969, an assistant superintendent gave testimony opposing proposed state legislation forbidding segregatory student transfers. Many transfers were approved, although contrary to "the capacity limitation in the . . . policy . . ." (A. 117, n. 20). Finally, there was evidence of discrimination in the implementation of the policy in 1970-71 (A. 115, n. 17).

Manipulation of the Grade Conversion Policy and Optional Zones

In 1950, the system began to modify grade structures, the primary goal being the conversion of K-8 schools to K-6 and the creation of junior high schools with grades 7-9 (A. 118). The conversion was achieved in a manner which minimized the necessity of assigning white seventh and eighth graders to the two identifiably black junior high schools: Mann and Tech. Two basic techniques brought about this result: (1)

delaying the conversion of predominantly white K-8 schools which would be logical feeders for Mann or Tech; and (2) granting options to the seventh and eighth graders in those schools to attend more distant identifiably white junior high schools, when the conversion did take place (A. 118-19; footnote omitted).

As of 1963-64, 14 of the original 46 K-8 schools remained K-8. Seven were located nearest to junior high schools other than identifiably black Mann and Tech. These seven schools were converted to K-6 in 1964-65, and all or part of their zones were assigned exclusively to one or more nearby junior high schools. "The remaining seven K-8 schools were . . . located so that the nearest junior high was Mann or Tech. All received unique treatment in the conversion process or were not converted" (A. 118, n. 21). As described above, this "unique treatment" involved delaying conversion to K-6 and creating optional attendance zones.

Among the effects of the conversion process were the promoting of segregation; giving students a choice of attending identifiably white and black schools; utilizing space in an unsound manner; students attending more distant schools, despite the neighborhood school policy; and housing seventh and eighth grade students in K-8 facilities not having "the enrollment or the facilities which the system considered appropriate for a junior high program" (A. 119-22). The Court of Appeals also noted that "the conversion of Yates had been delayed for one year because of parental opposition which [an] . . . assistant superintendent openly attributed to racial prejudice" (A. 120).

The Court of Appeals concluded:

> [W]e find the elaborate system of delayed conversion, optional zones, and the closing of Tech Junior High to be inexplicable unless in furtherance of a single coherent policy: the unwillingness to assign white students to schools perceived as black, the 'neighborhood school' or any other policies notwithstanding . . . (A. 122, n. 25).

School Construction

Of 60 new schools and an addition constructed from 1951-1973, 58 served identifiably white or black populations. The Court of Appeals noted the District Court's finding in denying preliminary relief, not cited in the opinion on the merits, that assignments to the King Middle School which opened identifiably black in 1973-74 were inconsistent with the neighborhood school policy (A. 123). As enrollment at Technical High School declined to the point where it was largely abandoned and it became increasingly identifiably black, the system first built additions at identifiably white Benson and North, and later opened Bryan, Burke and Northwest as white schools. Compare *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 21 (1971).

In general, the Court of Appeals rejected the neighborhood school defense.

> The defendants argue that their construction decisions are explained by adherence to a neighborhood school policy. However, the school district had no such consistent policy with respect to the black schools in Omaha and the schools on the fringe of the black community. Time and again, the policy —

> if one existed — was discarded whenever it would have had an itegrative effect: the defendants riddled it with exceptions, including a virtually automatic transfer policy, optional attendance zones in fringe communities, a shared attendance zone precluding anyone from being compelled to attend the only black high school (Tech), and geographically suspect assignment practices for predominantly black King Middle School. It is an understatement to say, as the Supreme Court found in *Keyes v. School District No. 1, supra*, at 212, that "the 'neighborhood school' concept has not been maintained free of manipulation" (A. 124, n. 28)

The Deterioration of Tech High School

Technical High changed from a heavily enrolled, predominantly white school in 1950 (17% black) to a largely empty (excess capacity of 1765), 96 percent black school in 1973-74. The Court of Appeals found that this resulted from the interaction of many practices: operating Tech well under capacity while neighboring white schools were overcrowded (A. 125); adding additions to adjoining white high schools and opening new high schools identifiably white, while Tech was well under capacity (A. 125); assigning students to Tech by choice (A. 125-26); dropping extra-curricular activities and the electronics course and adding courses "the school board felt would be more adequately suited to the needs of Tech's increasingly black enrollment, including culinary arts and auto body shop . . ." (A. 126); assigning special education students disproportionately to Tech so that it became "[a school for special education] except in name" (A. 126-27); and assigning most black high school teachers to Tech (A. 128).

There was explicit evidence that the maintenance of Tech High as a segregated school was based upon racial factors (A. 125-26, n. 30). The Court of Appeals concluded:

> The result of the defendants' actions . . . given the assignment of students to Tech by choice, was not just natural, probable and foreseeable, it was inevitable: a virtually all black and relatively empty school. That result is even more significant when it is recalled that Tech is located in a white neighborhood (A. 129).

ARGUMENT

I. The Liability Standard

A. The Decision Below Is Not in Conflict with *Keyes v. School District No. 1* or *Washington v. Davis*

The system contends that the decision below employs reasoning which "implicitly eliminated purpose or intent to segregate as an essential element of an Equal Protection Clause violation . . ." (Petit., p. 15), and, therefore, conflicts with *Keyes v. School District No. 1*, 413 U.S. 189 (1973) and *Washington v. Davis*, 44 U.S.L.W. 4789 (1976). This claim is erroneous.*

Preliminarily, repondents note that the argument is made as if the opinion below reflected only the extreme situations cited in the Petition, *i.e.*, a finding of segregative intent based upon utilization of a neighborhood school policy in a system with segregated

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*We discuss *Austin Independent School District v. United States*, 45 U.S.L.W. 3413 (12/6/76), filed after submission of the Petition, at p. 15, *infra*.

neighborhoods (Petit., p. 16), or "the mere presence of any racial imbalance . . ." (Petit., p. 17). However, this argument is only of academic interest, for the opinion below, see pp. 2-7, *supra*, is replete with a variety of kinds of evidence of segregative intent.

There was a longstanding pattern of discrimination in faculty assignment. Since assignment of staff is controlled by school authorities, the court below, as had other courts, recognized that this was "strong evidence that racial considerations ha[d] been permitted to influence the determination of school policies and practices" (A. 112-13 at n. 13, citing cases). This mode of analysis was similar to that employed in *Keyes*. See 413 U.S. at 207-08. There was also evidence in this case of segregatory actions: (1) accommodating community sentiment; (2) based upon racial factors; and (3) inconsistent with system policies (the capacity limitation in the transfer policy and the grade conversion policy) and sound practices (unequal utilization of space). The system opposed legislation to forbid segregatory student transfers, and there was some evidence of discrimination in the administration of the transfer policy. Technical High was subjected to manipulation of curriculum, and special education students were assigned there in highly disproportionate numbers. Some students were allowed to choose, with segregatory results, between schools which were racially identifiable in part because of segregatory faculty assignments. The neighborhood school policy, the source of the system's principal defense (see Petit., pp. 4-5), was manipulated in a segregatory manner.

In summary, this is not a situation where a bald

presumption, applied in an extreme manner, produced a finding of segregative intent.*

The system contends that the opinion below conflicts with *Keyes* because (1) *Keyes* "maintained the burden of proof on [the intent] issue on the plaintiff until the plaintiff demonstrated . . . a [segregative] purpose behind actions of school authorities producing racial separation in a meaningful portion of the school district" (Petit., p. 14), and (2) the presumption relied upon by the Court of Appeals "plac[ed] an impossible burden of explanation on school authorities" (Petit., p. 15). The first contention relies on *Keyes* with respect to an issue not involved in that case, *i.e.*, the standards applicable to an initial finding of segregative intent. The issue in *Keyes* concerned the weight to be given such a finding once made. Furthermore, *Keyes* explicitly recognized that "[i]n the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which 'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated" 413 U.S. at 209.

Second, the system contends that when the Court of Appeals, in explaining the circumstances under which the presumption of segregative intent could be rebutted, used the same standard utilized by this Court in *Keyes*,** it thereby placed an impossible burden of

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*The segregatory practices cited by the Court of Appeals, and summarized at pages 2-7, supra, were similar to those cited in this Court's decisions on the Denver and Detroit systems. See *Keyes, supra*, 413 U.S. at 201-02; *Milliken v. Bradley*, 418 U.S. 717, 725-26 (1974).

**See App. pp. 107-08: "When that presumption arises, the burden shifts to the defendants to establish that 'segregative intent was not among the factors that motivated their actions.' *Keyes v. School District No. 1*, 413 U.S. 189, 210 (1973)."

rebuttal on school authorities and effectively eliminated the requirement of proof of segregative intent. We disagree. A court will be warranted in finding that the presumption has been rebutted where officials establish that "their action or inaction was a consistent and resolute application of racially neutral policies" [*Oliver v. Michigan State Board of Education*, 508 F. 2d 178, 182 (C.A. 6, 1974)], they testify that there was no segregative intent, and there is no other direct proof of such intent. Here, given the evidence outlined by the Court of Appeals, the presumption could not be rebutted. Compare *Higgins v. Board of Education of the City of Grand Rapids*, 508 F. 2d 779 (C.A. 6, 1974).

Nor does the decision below conflict with *Washington v. Davis*, 44 U.S.L.W. 4790 (1976). In that case, the Court ruled that discriminatory purpose is an essential element of a constitutional violation, also recognizing that such intent may be established in a variety of ways. See 44 U.S.L.W. at 4792-93.

Here, the Court of Appeals held that segregative intent was required (A. 106), and its analysis, while not identical, conformed to this Court's reasoning on methods for establishing segregative intent. First, segregation of faculty, because it is subject to school system control "demonstrate[s] unconstitutionality because . . . [such] . . . discrimination is very difficult to explain on nonracial grounds" *Washington v. Davis, supra*, 44 U.S.L.W. at 4793. And the Court of Appeals' reliance on the faculty violation in analyzing system practices generally (A. 112-13, n. 13) was similar to

establishing a *"prima facie* case" of discriminatory jury selection by showing "the absence of Negros on a particular jury" and "the failure of the jury commissioners to be informed of eligible Negro jurors in a community . . . or with racially non-neutral selection procedures . . ." *Washington v. Davis, supra*, 44 U.S.L.W. at 4792. In each situation, reliance is placed upon a racial effect and one highly probative element of proof. Finally, since the Court of Appeals relied upon a variety of indicia of segregative intent, its opinion "inferred [segregative intent] from the totality of the relevant facts, including the fact . . . that . . . [practices bore] more heavily on one race than another" *Washington v. Davis, supra*, 44 U.S.L.W. at 4792.

Respondents do not argue that the Court of Appeals' analysis corresponds precisely with this Court's discussion in *Washington v. Davis* of permissible modes of establishing segregative intent. Yet, the Court of Appeals employed similar approaches, and the thrust of that section of *Washington v. Davis*, as respondents read it, was to indicate that segregative intent may, in different circumstances, be established in different ways.

The only reference in *Washington v. Davis* to the natural, probable and foreseeable standard is a supportive one in the concurring opinion of Mr. Justice Stevens. See 44 U.S.L.W. at 4800. ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the

natural consequences of his deeds.")* Furthermore, the concurring opinion recognized (*id.*) the difficulties in "uncover[ing] the actual subjective intent of the decisionmaker" (*id.*) which have led to longstanding and widespread utilization of the foreseeability standard.**

In *Allen v. United States*, 164 U.S. 492 (1896), this Court in approving a jury instruction in a murder case stated that the instruction in question was "nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act" 164 U.S. at 496. This principle and its related usages have continued to be applied to carry the "reasonable doubt" burden in criminal law. See *Cramer v. United States*, 325 U.S. 1, 31 (1945); *Cox v. Louisiana*, 379 U.S. 559, 567 (1965).

In *Cramer, supra*, this Court aptly recognized the need for such a presumption (325 U.S. at 31):

> What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were

*The Petition suggests (pp. 18-19) that *Washington v. Davis, supra*, 44 U.S.L.W. at 4793, n. 12, in its reference to *Wade v. Mississippi Cooperative Extension Service*, 372 F. Supp. 126, 143 (N.D. Miss., 1974), disapproved "a standard almost identical" to the one employed here by the Court of Appeals. However, *Wade* involved a court's requiring explanation based upon a showing of racial effects (see 372 F. Supp. at 143). Here, the Court of Appeals recognized the need for establishing segregative intent and employing a presumption and citing other evidence held that such intent was established.

**In the Detroit case, the finding of intentional segregation within Detroit, based upon a foreseeability standard, was approved by this Court as apparently correct. *Milliken v. Bradley*, 418 U.S. 717, 738 at n. 18, and 785 (dissenting opinion) (1974). See also *Keyes, supra*, 413 U.S. at 201-02 (building a school "to a certain size and in a certain location, 'with conscious knowledge that it would be a segregated school,'" quoting 303 F. Supp. at 285).

> to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses it would be to hold that it is never provable. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.

The same need exists in cases like this one. "[T]here are very few cases of school segregation today in which the defendants admit that they had an improper intent" *United States v. Board of School Commissioners*, 474 F. 2d 81, 88 (C.A. 7, 1973).

The natural, probable and foreseeable standard has also been approved by this Court in civil cases. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485 (1940) (suit to recover damages for violation of the Sherman Act); *Radio Officers Union of the C.T.U., A.F.L. v. National Labor Relations Board*, 347 U.S. 17, 44-45 (1954) (complaint against employer for discriminating against non-union employees in violation of the National Labor Relations Act); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (same).*

The use of the presumption or *prima facie* case to shift the burden of proof is similarly a long-recognized principle which this Court, as well as lower federal

*See also *Cleo Syrup Co. v. Coca Cola Co.*, 139 F. 2d 416, 419 (C.A. 8, 1943) (trademark infringement), cert. denied, 321 U.S. 781 (1944); *Myres v. United States*, 174 F. 2d 329, 334 (C.A. 8, 1949) (wilful evasion of income tax); *Sisco v. McNutt*, 209 F. 2d 550, 552 (C.A. 8, 1954) (tort action); *United States v. Price*, 464 F. 2d 1217, 1218 (C.A. 8, 1972) (interference with use of government facility); *Metropolitan Life Ins. Co. v. Henkel*, 234 F. 2d 69, 71 (C.A. 4, 1956) (civil action on insurance policy.)

courts, have seen fit to apply in numerous and diverse areas of the law, including cases involving racial discrimination. See *e.g., Swann, supra,* 402 U.S. at 18 (discrimination in school); *Missouri P. R. Co. v. Elmore & Stahl,* 377 U.S. 134, 138 (1964) (determination of shipper's liability for damage or loss to cargo); *United States v. Marine Bancorporation,* 418 U.S. 602, 631 (1974) (determination that market is candidate for the potential completion doctrine of the Clayton Act in civil antitrust action); *N.L.R.B. v. Great Dane Trailers, Inc., supra,* 388 U.S. at 34 (1967) (determination of anti-union motivation under §8(a)(3) of the National Labor Relations Act); *Hernandez v. Texas,* 347 U.S. 475 (1954) (determination of racial discrimination in jury selection); *Turner v. Fouche,* 396 U.S. 346 (1970) (same); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) (racial discrimination in employment); *United States v. City of Black Jack,* 508 F. 2d 1179 (C.A. 8, 1974), cert. denied, 43 U.S.L.W. 3674 (June 23, 1975) (racial discrimination in housing); *Hodgson v. First Fed. Sav. and Loan,* 455 F. 2d 818, 822-23 (C.A. 5, 1972) (age discrimination).

In *Missouri P. R. Co. v. Elmore & Stahl, supra,* the Court recognized that the general rule shifting the burden to the carrier in a cargo damage case was

> based upon the sound premise that the carrier has preculiarly within [its] knowledge [a]ll the facts and circumstances upon which [it] may rely to release it of [its] duty . . . . 377 U.S. at 143.

Similarly, in *N.L.R.B. v. Great Dane Trailers, Inc., supra,* once a *prima facie* case of anti-union motivation

is proven (by proof of employer conduct which could adversely affect union employee rights),

> . . . the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. 388 U.S. at 34.*

And, as we have noted, this Court's decision in *Keyes* recognized that there are a variety of situations in which "fairness" and "policy" require officials to explain actions which appear to be racially motivated.

The decision below is not in conflict with *Austin Independent School District v. United States,* 45 U.S.L.W. 3413 (12/6/76). There, the primary thrust of the Court of Appeals' reasoning on the intent issue was that school segregation was intentional because it was the "natural, foreseeable, and inevitable" result of Austin's neighborhood school policy, given the system's segregated neighborhoods. See *United States v. Texas Education Agency,* 532 F. 2d 380, 390, 392 (C.A. 5, 1976). In short, an assignment policy which "might well be desirable" (*Swann, supra,* 402 U.S. at 28) was articulated as alone sufficient to establish segregative intent, irrespective of other segregatory pupil assignment practices or evidence of segregative intent. Here, in

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*This Court has, in fact, shifted the burden of proof to the defendant in other circumstances without the use of a presumption or *prima facie* case when certain evidence or material lies particularly within the knowledge of the defendant. *United States v. The New York, New Haven & Hartford Railroad Company,* 355 U.S. 253, 256 (5) (1957); *Campbell v. United States,* 365 U.S. 85, 96 (1961); see also, *Nader v. Alleghany Airlines, Inc.,* 512 F. 2d 527, 538 (C.A.D.C., 1975).

contrast, the foreseeability standard was applied to a longstanding pattern of segregatory faculty assignments (A. 110-13), segregatory student transfers (A. 114-17) pursuant to a policy which was an exception to the neighborhood school policy, the crazy-quilt pattern resulting from implementation of the grade conversion policy (A. 118-22), school construction (A. 123-24), and a pattern of conduct affecting Tech High (A. 124-29). Moreover, much of the segregatory conduct was inconsistent with system policy and sound practice (*e.g.*, allowing transfers into crowded schools, delaying grade conversion, and utilizing facilities unequally), and the Court of Appeals cited other evidence of segregative intent (*e.g.*, actions based on racial factors and accommodating community sentiment).

B. The Asserted Conflict in the Court of Appeals

The nub of petitioners' argument on conflict in the circuits is that unfair burden-shifting principles have been employed on the intent issue in three decisions in addition to the decision below.* We have argued above that the Court of Appeals' decision here was proper given the full sweep of the evidence establishing segregative intent; and we make the same contention below as to *Hart* and *Oliver*. The decision in the Austin case, unique because of its treatment of the neighbor-

*These decisions are *Hart v. Community School Board of Education*, 512 F. 2d 37 (C.A. 2, 1975); *United States v. Texas Education Agency*, 532 F. 2d 380 (C.A. 5, 1976), vacated and remanded *sub nom., Austin Independent School District v. United States*, 45 U.S.L.W. 3413 (12/6/76); and *Oliver v. Michigan State Board of Education*, 508 F. 2d 178 (C.A. 6, 1974), cert. denied, 95 S. Ct. 1950 (1975).

hood school policy, has already been addressed by this Court.

In *Hart v. Community School Board of Education, supra*, the Court of Appeals for the Second Circuit, employing the foreseeability standard, ruled that the one school involved in the litigation had been illegally segregated. In setting forth the facts, the Court described changes in a feeder pattern, attendance zones and grade organization, and a repeated failure to approve remedial plans, all of which in a several-year period created and maintained racial segregation in the school. See 512 F. 2d at 46-47, 50-51. Considered as a whole, these actions evinced a systematic effort to save white pupils from attendance at the school. Petitioners contend, in effect, that the *Hart* Court established an irrebuttable presumption (Petit., pp. 21-22). However, in expressing the rule, the Court of Appeals stated that foreseeable impact would "support a finding" (512 F. 2d at 51), not compel one; and, in citing analogous rules, it referred to "[p]rima facie intent" and what juries would be "permitted . . . to find . . ." 512 F. 2d at 50. Moreover, in view of the pattern of conduct described above, it was clear that the presumption could not be rebutted.

Similarly, in *Oliver v. Michigan State Board of Education, supra*, involving use of a foreseeability standard, the opinion cites much evidence probative of segregative intent. This included deliberate segregation of faculty (508 F. 2d at 185), manipulation of the neighborhood school policy (508 F. 2d at 183), creation of optional attendance zones "to assure eventual racial segregation in areas of the city with changing residential patterns" (508 F. 2d at 184), addition of permanent and portable classrooms at white schools to house white

pupils, although identifiably black schools had space (508 F. 2d at 184), participation in the creation of a new white subdivision and school (508 F. 2d at 184), and provision of inferior facilities to black pupils (508 F. 2d at 185).

The system contends that different standards brought about opposite results in the face of similar facts here and in *Higgins v. Board of Education of the City of Grand Rapids,* 508 F. 2d 779 (C.A. 6, 1974). See Petition, p. 23. There, the Sixth Circuit, without employing a presumption, upheld a district court decision finding a lack of segregative intent in student assignment practices. The district court's finding of discrimination in faculty assignment was not appealed. There are significant differences between *Higgins* and this case. First, a reading of the opinions reveals a greater number of student assignment practices having a segregative effect in Omaha than Grand Rapids. Second, the *Higgins* opinion does not reveal evidence of explicit racial intent, as here. Third, the Court of Appeals in *Higgins* repeatedly stressed its conclusion that the Grand Rapids system has operated a "pure neighborhood system" (508 F. 2d at 785, 790, 791, 792), unlike the manipulated one found here (A. 124, at n. 28). Fourth, unlike here, the Court of Appeals in *Higgins* found that the system had adopted a meaningful, voluntary desegregation program, 508 F. 2d at 784, 786, 787. In essence, the *Higgins* court ruled that to the extent practices had "some incidental racial effect" (508 F. 2d at 788), this was explicable as resulting from "a consistent and resolute application of racially neutral policies" *Oliver v. Michigan State Board of Education, supra,* 508 F. 2d at 182.

Finally, petitioners contend that different intent standards produced the different results in the courts below in this case. This argument ignores the many differences between the opinions below. In addition to the Court of Appeals' application of a different standard on the issue of segregative intent (A. 105-10), at least seven factors played a part in its reversal of the District Court:

1. The Court of Appeals' conclusion that the trial court made several errors on faculty segregation issues, namely (a) the District Court's incorrect view of the duration of the practice of deliberate faculty segregation which it found (A. 90, 102-03, 111-12); (b) the District Court's error in viewing a good-faith reliance on a "role model" theory as "entitled to some weight in any ultimate conclusion regarding segregative intent . . ." (A. 90, 113 at n. 14); and (c) the District Court's failure to give weight to the longstanding pattern of deliberate faculty segregation in assessing segregatory student assignment practices (A. 112-13 at n. 13).

2. The Court of Appeals' giving of appropriate weight to evidence of a pattern of student assignment practices having a segregatory effect, *i.e.,* optional and dual zones (A. 119, 125-26); a transfer policy (A. 114-17); school construction (A. 123-24, 125); the selective implementation of a grade conversion policy (A. 118-20); unequal utilization of facilities (A. 125); and the deterioration of Technical High School (A. 124-29).

3. The Court of Appeals' giving of weight to explicit evidence of racial intent (A. 113 at n. 14, 117-18 at n. 20,

120, 125-26 and n. 40), which the District Court largely ignored.

4. The Court of Appeals' giving of weight to evidence that segregatory practices were generally inconsistent with system policies, including the neighborhood school policy (A. 117-18 at n. 20, 119-20, 124 at n. 28, 125), which the District Court largely ignored.

5. The Court of Appeals' giving of weight to important findings made by the District Court in its opinion denying preliminary relief but ignored in the opinion on the merits (A. 115 at n. 17, 123 at n. 26).

6. The District Court's making of four "clearly erroneous" factual findings (A. 116, 121, 122; compare 126-27 and 73).

7. The District Court's apparent reliance on the "separate but equal doctrine" (A. 127-28 and n. 31).

II. The Remedy Issue

A. The Remedial Guidelines Established by the Court of Appeals are Supported by the Facts and Consistent with this Court's Remedy Decisions.

The school system submits that the remedy ordered in this case is disproportionate to the wrongs committed by school authorities. In so arguing, the system correctly notes that the decision in this case is *consistent* with most other lower federal courts which

have been faced with the duty to implement the principles of desegregation as established by this Court (Petit., p. 24). See, *e.g.*, *Morgan v. Kerrigan*, 530 F. 2d 401 (C.A. 1, 1976), cert. denied 44 U.S.L.W. 3717 (6/15/76); *Brinkman v. Gilligan*, 518 F. 2d 857 (C.A. 6, 1975), cert. denied 423 U.S. 1000 (1975); *Keyes v. School District No. 1, Denver*, 521 F. 2d 465 (C.A. 10, 1975), cert. denied 44 U.S.L.W. 3399 (1/13/76).

The system attempts to persuade this Court by noting, in part, the "drastic alterations in normal neighborhood student assignment procedures," the "expenditure of millions of dollars for buses and gasoline instead of education," the "deep public concern on the role of the federal courts," and implicitly the violence which has occurred in some school districts as a result of the remedies which have been implemented to remedy the illegal activities of school officials.

However, the Court of Appeals pointed out that the drastic alterations in the normal neighborhood assignment procedures preexist desegregation in Omaha — and, in fact, this "normal" policy was readily discarded in Omaha whenever it would have had an integrative effect (A. 124). And while fiscal responsibility in education is a legitimate and worthy goal, the same was true when the School District needlessly built schools to accommodate white community sentiment and thus avoid substantially less expensive integrative alternatives. Finally, this Court has recognized that the history of desegregation has been marked with "deliberate resistance," *Swann, supra*, 402 U.S. at 13. But this Court has consistently stated that the vitality of the

constitutional principles involved "cannot be allowed to yield simply because of disagreement with them" *Brown v. Board of Education,* 349 U.S. 294, 300 (1955); *Swann, supra,* 402 U.S. at 13. It is this commitment to legal principle and the refusal to acquiesce to the relatively isolated, though disconcerting, violent response to desegregation which in the end maintains true confidence in the judicial system.

1. *The Facts Require Systemwide Desegregation.*

The school system's position on remedy is plagued by the same error as its argument on violation: Its persistent refusal to recognize the pervasiveness of the segregative policies found unconstitutional by the Court of Appeals. The Petitioners, almost wishfully, but assuredly unrealistically, describe the constitutional violations found by the Court of Appeals as being "slight variations in the neighborhood school assignment policy" (Petit., p. 31), and having "effects [which] were negligible" (Petit., p. 29).

The system persistently disregards the fact that numerous segregatory policies operated within the system hand-in-glove with each other over a period of several years. For example, the system attempts to isolate one policy, *i.e.,* failure to assign Sherman and Pershing Elementary Schools as feeder schools at Horace Mann Junior High School, as if that were the only segregatory policy affecting Horace Mann Junior High School. In fact, Horace Mann was also affected by the transfer policy (A. 116), the optional attendance zone policy (A. 118 and 121), the construction policy, and the faculty assignment policy.

The system also cites the Court of Appeals' finding that, notwithstanding the optional attendance zone policy, Technical Junior High School would have been an identifiably black school (Petit., p. 30). Once again, the system isolates a single year impact of one of its segregatory policies with apparent hopes that this Court (a) will not recognize that the policy operated and had effects over a 7-year period (A. 118-122);* (b) will not read further in the Court of Appeals' opinion and note the Court of Appeals' specific finding that, without the segregatory operation of the special transfer policy and the conversion policy, Technical Junior High's enrollment would have approached 50% black** (A. 119, fn. 22); and (c) will no longer accept its own recognition that the policies of the kind involved in this case (optional attendance zones, special transfer policy, delayed grade conversions, faculty assignment)

> have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. *Keyes, supra,* 413 U.S. at 202.

This attempt by the system to downplay the impact of its unconstitutional policies in order to restrict the

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*As noted by the Court of Appeals, this was the only year for which data was available (A. 119). Nevertheless, even in isolation from other policies and other years, an 18% impact on the racial composition of the school is hardly negligible.

**This percentage is reached without consideration of the impact of construction policies and faculty assignment policies on Technical Junior High.

remedy must fail. A brief and necessarily *partial* review of the facts is demonstrative (see, also, discussion above, at pp. 2-7, and see Court of Appeals' opionion at A. 110-29).

The assignment of faculty on a segregatory basis necessarily affected every school in the system. For the 23 years following the initial hiring of black teachers, the assignment of teachers was completely segregatory; *i.e.*, black teachers were assigned only to majority black schools (A. 111). Subsequently, and by the year 1972-73, this pattern of assignment had changed, but only negligibly; *i.e.*, 51 of the School District's 98 schools did not have a single black faculty member (A. 112). The school system argues that assignment of black faculty to a school already black in student enrollment cannot be said to cause the segregation in that school (Petit., p. 32); but this argument overlooks principles firmly recognized by this Court. This Court in *Keyes* repeatedly referred to policies and practices which "create" or "maintain" segregation, *Keyes, supra*, 413 U.S. at 191, 198, 206, 211.

Furthermore, this Court has specifically recognized that segregation of staff promotes identification of schools as "black" and "white," and is "among the most important indicia of a segregated system" *Swann, supra*, 402 U.S. at 18. See, also, *Keyes, supra*, 413 U.S. at 202 ("... the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition").

The Eighth Circuit specifically found that the general pattern of construction, along with specific examples, warranted a determination that the construction policies of the School District were unconstitutionally segregatory (A. 123-24). Indeed, that general pattern of construction has had a substantial effect on the segregation of the Omaha School District. Thirty-seven (37) schools were built as segregated schools during the time period between 1951-73. This represents over 38% of all the schools in the entire school system. The pervasiveness of the impact of this pattern of segregative school construction in the entire system is not only apparent on its face, but is buttressed by this Court's recognition of the impact of school construction on the racial composition of both other schools and residential neighborhoods. See *Keyes, supra*, 413 U.S. at 202-03, and *Swann, supra*, 402 U.S. at 20-21.

The system, unable to deny the segregative impact of the transfer policy, labels its effects as negligible by citing the 3-4% *average* difference in black enrollment at certain schools. Thus, the system particularizes the impact to a single year, notwithstanding the fact that the transfer policy was in operation 9 years prior to trial. Clearly, the cumulative effect of the policy over the years and, more precisely, in the context of other segregatory policies (faculty assignment, construction, etc.), was "profound" as noted by the Court below (A. 116).

The cumulative effect of several of the segregative policies is most readily demonstrable at Technical High School. The open enrollment policy at Technical High (A. 125), the transfer policy (A. 116), and curriculum

policy at Technical High School (A. 126) combined to cause a rapid decline in enrollment at Technical High (A. 125), an increase in the percentage of black enrollment (96% in 1973) (A. 125), and a concomitant overcrowding at neighboring high schools (Benson, South, and North) (A. 125). As a result, the school system's construction policy responded by building additions at Benson, South, and North (all of which were predominantly white at the time) (A. 125). When these additions were unable to accommodate the continuing increase at these schools, and although Technical High was increasingly under-utilized, the school system's construction policy responded again by building three new high schools on the periphery of the system, all of which opened with a white enrollment in excess of 95% (A. 125). This costly and segregative pattern of conduct was due, in part, to perceived white community opposition to a compulsory attendance zone which would force white parents to send students to a black Tech High (A. 125). The evidence in this case thus confirms this Court's analysis that this pattern of conduct is "a potent weapon for creating or maintaining a state-segregated school system" and not only influences "the short-run composition of the student body of a new school" but "may well promote segregated residential patterns which when combined with 'neighborhood zoning' further lock[ing] the school into the mold of separation of the races." *Swann, supra,* 402 U.S. at 21.

The Court of Appeals noted that the segregatory policies of the system were designed, in part, to accommodate white community sentiments and, more

particularly, perception of certain schools as black schools and the resulting resistance to attendance at those schools. The assignment of faculty was an effectuation of "the discriminatory design of private individuals" (A. 113). The "elaborate system of delayed conversion, optional zones, and the closing of Tech Junior High" was only explicable as a "furtherance of a single coherent policy: the unwillingness to assign white students to schools perceived as black, the 'neighborhood school' or any other policies notwithstanding" (A. 122, fn. 25). The school administration implemented the racially prejudiced community perceptions of Technical High School as a black school by refusing to establish a compulsory attendance zone for Tech (A. 126, fn. 30). The school administration itself perceived Tech as the black high school, as evidenced by its characterization that "while it has not been officially designated or recognized as such, Technical has been, in effect, the high school for the Black Community" (Trial Exhibit 427, p. 2). Thus, the school administration developed attitudes toward schools as "black" or "white" schools and was well aware of the community's proclivity to do the same.*

2. The Law Requires Systemwide Desegregation.

The school system argues that the decisions of this Court support its position that the scope of remedy exceeds the scope of the violation. To the contrary, this Court's decisions support the systemwide desegregation

*The system's granting of transfer requests explicitly based on racial factors was an additional method which white community attitudes "against" black schools was sanctioned by, and incorporated in, school policy (A. 117).

of the Omaha School District.* Thus, the system attempts to not only unduly limit the evidence, but also overlooks the law applicable to the remedy. While noting the remedial principle of Brown II and noting its recent reassertion in the *Pasadena* case (Petit., p. 27), the system omits significant principles which this Court has developed, which are directly applicable to (and supportive of) the remedy ordered in this case.

The system attempts to imply that this Court, in *Pasadena City Board of Education v. Spangler,* 96 S. Ct. 2697, 2704-05, erased 21 years of judicial decision-making in desegregation cases, and, thus, the principles enunciated in *Green, Swann,* and *Keyes* no longer have force and effect. This argument is without merit.

The school system's argument ignores the differences between the issues involved in *Pasadena* and in this appeal. In *Pasadena,* the Court considered the authority of a district court to require further changes in pupil as-

*The system makes much of the Court of Appeals' requirement to "thoroughly integrate" the school system. Yet, the flexibility and lack of overbreadth in the Eighth Circuit's guidelines is best evidenced by the plan approved by the District Court and the Court of Appeals, implemented this past fall and now before this Court on the school system's Petition for a Writ of Certiorari. The plan itself specifically excludes significant portions of the system from mandatory reassignment. The entire first grade (over 5,000 students); approximately 1,700 second and third grade students; 3 special education schools; 8 categories of children with special education needs; 9 elementary schools already desegregated; most of the students in 7 junior high schools and the students in all 7 high schools (in part because of the effectiveness of voluntary transfer and in part because of the flexible parameters of the Court's guidelines were exempted from mandatory reassignment (see A. 147-65). Thus, the plan ultimately approved by the lower court not only was *not* overbroad, but may well have fallen short of this Court's requirement of "all-out desegregation."

signment, *after* a desegregation plan had been fully implemented (see 44 U.S.L.W. 5116).* Here, in contrast, one issue involves the scope of the authority to require desegregation in the first instance, an issue addressed in *Green, Swann,* and *Keyes.* In these circumstances, it stretches much too far to contend that this Court has *sub silentio* limited or overruled *Green, Swann,* and *Keyes.*

Furthermore, the school system does not discuss the nature of the desegregation plan implemented in *Pasadena,* a significant omission, since it was this plan which the Supreme Court characterized, in the part of the opinion upon which the system relies, as having established a "racially neutral" attendance method (see 44 U.S.L.W. at 5117). ("... [the district's] adoption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in PUSD"). The Supreme Court did not describe the Pasadena Plan in detail, referring to it only as "a systemwide school reorganization plan ..." 44 U.S.L.W. at 5116. The lower court's opinion, however, shows that the "school reorganization" required in *Pasadena* was similar to the one required here (see 519 F. 2d at 432-33).

In summary, neither the holding nor the language of the *Pasadena* opinion supports the school system's claim for miniscule relief.

The petitioners speak in terms of "assessing the exact extent of the racial separation effects." This

*"All that is now before us are the questions whether the District Court was correct in denying relief when petitioners in 1974 sought to modify the 'no majority' requirement as then interpreted by the District Court."

approach would require plaintiffs to not only prove a school district's intentional segregative policy as to a particular school, but, more particularly, to demonstrate the extent of the effect of the policy at that particular school.* From this proof would then flow the remedy. This approach has been rejected by this Court.

In *Keyes*, this Court said:

> We have never suggested that Plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system . . . . . where Plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and faculties within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. *Keyes, supra*, 413 U.S. at 200-01.**

See, also, *Swann*, 402 U.S. at 18. The "common sense" of this approach is as applicable to Omaha as to Denver or Charlotte. The evidence underpinning that common sense is overwhelming in this case.

Furthermore, this Court in *Keyes* recognized that community and administration attitudes toward

*This effort to require precise factual quantification of the effects creates what one Court of Appeals understatingly recognized as an "awesome task" *Morgan v. Kerrigan, supra*, 530 F. 2d at 418.

**See, also, *Morgan v. Kerrigan*, 530 F. 2d at 417: "While de jure segregation may not have been established at each and every school in the system, 'common sense,' to use the words of the [Supreme] Court, supports the conclusion that effects of the proven discriminatory actions pervade the school system as a whole."

schools are important factors in determining the existence of a "segregated" school in the *dejure* context. *Keyes, supra*, 413 U.S. at 196. The existence of the several segregatory policies in Omaha, which were, in part, based on community and administration attitudes, clearly supports the wisdom of this Court in *Keyes*.

It is too late now to dispute that the evidence in this case demonstrated that the school authorities "carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and faculties within the School System." *Keyes, supra*, 413 at 201. Thus, this Court, and common sense, support the Court of Appeals' conclusion that there exists a predicate for a finding of the existence of a dual school system. *Keyes, supra*, 413 U.S. at 201.* This Court's decisions in *Swann, Davis, Green*, and *Keyes* establish that when intentional official action has significantly contributed to segregation in substantial portions of a school system, the individual schools in the system must be subjected to the maximum feasible desegregation if official action "created or maintained" the racial segregation contained therein. *Morgan v. Kerrigan, supra*, 530 F. 2d at 417.

This Court has made it clear that the remedy in a case involving a non-statutory "dual system" is "all-out desegregation." *Keyes*, 413 U.S. at 214. And "every effort to achieve the greatest possible degree of actual desegregation" *Swann*, 402 U.S. at 26. In *Milliken v. Bradley, supra*, 418 U.S. at 717, this Court noted that,

*This Court of Appeals found exactly that (see, *e.g.*, A. 101, 110, 112, 117).

because of certain policies and practices in the Detroit School System,* "the constitutional right of the Negro respondents residing in Detroit is to attend a *unitary school system* in that district." *Milliken v. Bradley, supra,* 418 U.S. at 746 (emphasis added). To that end, the Court ordered "formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools." *Milliken, supra,* 418 U.S. at 753.** That is exactly what the Court of Appeals did in its remedial order (A. 129).

Clearly, the Court's remedial guidelines and the desegregation plan finally approved and implemented are well grounded in the remedial principles promulgated by this Court and are a result of the balancing of the individual and collective interests to correct the condition that offends the Constitution. *Milliken v. Bradley, supra,* 418 U.S. at 138.

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*These policies and practices were similar to those found in this case; *e.g.*, compare 418 U.S. at 725 and A. 118-22 (optional attendance zones); 418 U.S. at 726 and A. 123 (school construction).

**See, also, *e.g., Brinkman v. Gilligan,* 503 F. 2d 684 (C.A. 6, 1975), and 518 F. 2d 857 (C.A. 6, 1975) (more limited showing warranted all-out desegregation); *Keyes v. School District No. 1, Denver,* 521 F. 2d 465 (C.A. 10, 1975); *United States v. Board of Sch. Com'rs, Indianapolis, Ind.,* 474 F. 2d 81 (C.A. 7, 1971), and 503 F. 2d 68 (C.A. 7, 1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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